

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 02-387
Table of Allotments,)	RM-10623
FM Broadcast Stations.)	
(Lahaina and Waianae, Hawaii))	

NOTICE OF PROPOSED RULE MAKING

Adopted: December 20, 2002

Released: December 24, 2002

Comment Date: February 14, 2003

Reply Comment Date: March 3, 2003

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a petition for rule making filed by Pacific Radio Group ("Petitioner"), licensee of Station KLHI(FM) ("KLHI"), Channel 266C, Lahaina, Hawaii. Petitioner seeks to amend the FM Table of Allotments by changing Station KLHI's community of license from Lahaina to Waianae, Hawaii and provide Waianae with its first local aural transmission service. Petitioner states that if the Commission grants its petition for rule making, petitioner will file an application specifying operation on Channel 266C at Waianae and will construct the requested facility.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.¹ In support of its proposal, Petitioner explains that the proposed use of Channel 266C at Waianae is mutually exclusive with Station KLHI's existing authorization at Lahaina.

3. Petitioner asserts that the adoption of its proposal will result in a preferential arrangement of allotments consistent with the *Revision of FM Assignment Policies and Procedures*,² by providing Waianae, Hawaii (population of 10,506),³ with its first local aural transmission service. The allotment of Channel 266C to Waianae would not deprive Lahaina (population of 9,118) of its sole local transmission outlet, because Lahaina will retain local service from Station KPOA(FM), Channel 228C.

4. Although Waianae is located outside of any urbanized area, Station KLHI would place a 70 dBu contour over 100 percent of the Honolulu, Hawaii and Kailua (Honolulu County)-Kaneohe, Hawaii Urbanized

¹ See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

² *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service and (4) other public interest matters [co-equal weight is given to priorities (2) and (3)].

³ Population figures reported herein were taken from the 2000 U.S. Census.

Areas from its proposed location serving Waianae. In these circumstances, the rulemaking proponent must demonstrate that the intended city of license is sufficiently independent of the urbanized area to justify a first local service preference.⁴ Petitioner has provided a *Tuck* analysis to demonstrate that Waianae is sufficiently independent of the Honolulu, Hawaii Urbanized Area to merit a first local service preference.⁵ Parties may comment on this submission. Petitioner must also provide a *Tuck* showing for the Kailua (Honolulu County)-Kaneohe, Hawaii Urbanized Area. We believe that Petitioner's proposal warrants consideration since the allotment of Channel 266C to Waianae, Hawaii, could provide a first local aural transmission service to Waianae.

5. Since the transmitter site for Station KLHI will be relocated to accommodate Petitioner's request to reallocate Channel 266C from Lahaina to Waianae, gain and loss areas will be created. Our engineering analysis reveals that Petitioner's reallocation proposal will result in a net gain in population of 742,649 people and a net loss in area of 1,112 square kilometers. Petitioner asserts that all of the loss area will be well served.

6. Since Petitioner's reallocation request is consistent with the provisions of Section 1.420(i) of the Commission's Rules, we shall propose to modify the authorization of Station KLHI(FM) without entertaining competing expressions of interest in the use of Channel 266C at Waianae, Hawaii, or requiring Petitioner to demonstrate the availability of an additional equivalent channel for use by other parties.

7. Consistent with the technical requirements of the Commission's Rules, Channel 266C can be allotted to Waianae, Hawaii, at Petitioner's specified site, utilizing coordinates 21-23-51 NL and 158-06-01 WL, with a site restriction of 10.7 kilometers (6.6 miles) southeast of Waianae.

8. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

Channel Nos.

<u>City</u>	<u>Present</u>	<u>Proposed</u>
Lahaina, Hawaii	228C, 266C	228C
Waianae, Hawaii	-----	266C

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

⁴ See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995).

⁵ See *Huntington Broadcasting Co. v. F.C.C.*, 192 F. 2d 33 (D.C. Cir 1951), *RKO General, Inc. ("KFRC")*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck ("Tuck")*, 3 FCC Rcd 5374 (1988).

10. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before February 14, 2003, and reply comments on or before March 3, 2003, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the Joint Parties' counsel, as follows:

Mark N. Lipp, Esq.
J. Thomas Nolan, Esq.
Shook, Hardy & Bacon
600 14th Street, NW, Suite 800
Washington, D.C. 20005-2004

11. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁶

13. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

⁶ See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

Any comment, which has not been served on the petitioner, constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment that has not been served on the person(s) who filed the comment to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW, Washington, D.C.